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Reynolds C. Seitz

RIGHTS OF SCHOOL TEACHERS TO ENGAGE IN LABOR ORGANIZATIONAL ACTIVITIES

REYNOLDS C. SEITZ**

There would likely be no purpose to this discussion if the objective were to present the extent to which a public school teacher and employee organization or union, could compel a School Board to recognize it and respond to its efforts at concerted activities by making agreements of the type common in the field of commercial industrial relations.

Unless there is enabling statutory legislation (and generally throughout the country there is not such legislation) there are no established procedures by which unions or organizations of teachers and school personnel can compel School Boards to recognize them and bargain collectively. This differs from the situation in private industry where state and federal laws require that the employer must bargain with the union chosen as the bargaining agent by a majority of employees in an appropriate unit.

Not only is there generally an absence of statutes compelling School Board participation in collective bargaining, there is also no solid body of court-fashioned law which would so require. Indeed, in some early cases[1] courts have refused to promote the philosophy of the right to organize and engage in collective bargaining by finding no constitutional impairment of the right to assemble in the little legislation which had gone so far as to deny to teachers who joined unions the opportunity of employment.

Why, then, go on with the discussion? The full justification can be found in the fact that many School Boards may be so prompted by sentiments of fair dealing or a public relations sense which sees valuable dividends in the form of good will and strengthened morale.

Then, too, the discussion should serve to predict the extent of the requirement to negotiate if legislation in particular states or local communities should decree a duty to bargain. The analysis has additional

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**Dean and Professor of Labor Law. Marquette University Law School. Formerly assistant to the superintendent of public schools in Omaha and in St. Louis; senior attorney, National Labor Relations Board, Washington, D.C.; Montgomery Ward and Co., Chicago; executive, Chicago Daily News; associate professor labor law, comunications law and school law at Northwestern University. Experienced labor arbitrator. President National Organization on Legal Problems of Education during 1958 and 1959.

[1] People ex. rel Fursman v. City of Chicago, 278 Ill. 318, 116 N.E. 158 (1917), and Seattle High School Chapter No. 200 v. Sharples, 159 Wash. 424, 293 Pac. 994 (1930).

use as suggesting a yardstick which courts will undoubtedly use, if there should be any disposition to find a common law right for school personnel to assemble and bargain collectively.

Granting, therefore, that there is good reason for the discussion, the task presently becomes primarily that of determining to what extent School Boards may voluntarily engage in collective bargaining and bind themselves contractually through agreements with public school employee organizations and unions.

The greatest obstacle[2] to acceptance of the right of School Boards to voluntarily engage in collective bargaining, culminating in contract agreements, is the position of many public officials that the public employer is under a sovereign disability to emulate the practice in the private employment relationship. The outlook of the public bodies which follow such philosophy is based upon the doctrine that the determination of employment conditions in the public service is an inherent legislative function and that neither the executive nor legislature may delegate to any outside group, such as a labor organization, the functions entrusted to it under the basic scheme of government. As a corollary, it is contended that exclusive recognition and bargaining are plainly at odds with the principles which characterize the legislative civil service and merit system provisions.[3]

In spite of such prevailing attitudes and similar expressions by some courts,[4] many governmental units have gone a long way to fashion their labor relations policy along lines similar to that controlling in the commercial and industrial area. Four current case histories are analyzed in the *1959 Proceedings of the Section on Labor Law of the American Bar Association*.[5] Not all the case histories involved a record of the activity of teachers or school personnel, but the principles enunciated are controlling in the area of workers in education.

It becomes pertinent now to turn directly to an analysis of the sup-

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[2] Report of the Committee on Law of Government Employee Relations, 1959 Proceedings of Section of Labor Relations Law, American Bar Association, page 87.

[3] The restrictive principles mitigating against development of a labor relations policy comparable to that found in private industry are spelled out in detail in Report of the Committee on State Labor Legislation, 1958 Proceedings of the Section on Labor Relation Law, American Bar Association, page 147. See also Labor Relations in Public Service, 10 Syracuse L. Rev. 183 (1959).

[4] Mugford v. Mayor and City Council of Baltimore, 185 Md. 206, 44 A. 2d 745 (1945); City of Cleveland v. Division 268, Amalgamated Assoc. of Street, Electric and Motor Coach Employees of Amer., 30 Ohio Opin. 395 (1945); Nutter v. Santa Monica, 74 Cal. App. 2d 292, 168 P. 2d 741 (1946); Springfield v. Clouse, 356 Mo. 1239, 206 S.W. 2d 539 (1947); Miami Water Works, Local No. 654 v. Miami, 157 Fla. 445, 26 S. 2d 194 (1946); Wagner v. Milwaukee, 177 Wis. 410, 188 N.W. 487 (1922), and C.I.O. v. City of Dallas, 198 S.W. 2d 143 (Tex. 1946).

[5] Pp. 87-113. See also Klaus, Labor Relations in Public Service, 10 Syracuse L. Rev. (1959); Labor Relations for Employees of the City of New York, 12 Ind. & Lab. Rel. Rev. 618 (1959).

port which courts have given to those governmental units that wish voluntarily to respond favorably to some of the efforts of public employees to engage in the concerted activities common for labor organizations. The same study will furnish a foundation for judgment as to the extent to which legislative provisions may support the endeavors of public employees to participate in concerted activities familiar in the area of industrial relations.

The springboard case which leads into this discussion is the 1951 Connecticut Supreme Court decision of *Norwalk Teachers' Ass'n. v. Board of Education of the City of Norwalk.*[6] The Court bluntly stated that in the absence of a prohibitory statute, or regulation, no good reason appears as to why public employees should not organize as labor unions.

This seems utterly sound. Indeed, it would not be surprising if future litigation was able to establish that statutes prohibiting the joining of unions were offensive to the United States Constitution First Amendment protection to freedom to assemble. Some state court holdings to the contrary do not seem persuasive. The state decisions asserting no first amendment rights, proclaim that employees overlook the fact that no one has a right to demand that he be employed in governmental service[7] and that employees ignore the principle that by voluntarily accepting employment with a governmental unit, they assume the obligations incident to such employment and implicitly agree to come under the conditions as they existed.[8] In the face of the clear first amendment right of freedom to assemble, such arguments appear no more plausible than would the contention that first amendment freedom of religion rights would give way to a pronouncement that governmental employees were not to become members of a certain recognized church.

The only logical justification for prohibiting public employees from joining a labor union, would seem to require a finding that labor unions generally seek to force their employee members to do something which is inconsistent with the position of the employee as a governmental worker. For instance, if it could be established that all unions advocated that government employees use the strike weapon, it might be reasonable for the legislature to forbid governmental employees to join a union. All unions do not, however, agitate for use of improper methods or attainment of unlawful goals. There appears, therefore, no valid ground on which prohibition of union membership can be based.

Of course, merely granting employees of government the privilege of joining a union will not put them on a plane of equality with industrial workers. To approach such equality the employees must have the

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[6] 138 Conn. 269, 83 A. 2d 482 (1951).
[7] Fursman v. City of Chicago, *supra,* note 1.
[8] C.I.O. v. City of Dallas, *supra,* note 4.

right to be represented in collective bargaining by an organization or union. And the unit of government must have the power to bind itself through certain contractual terms which are the product of collective bargaining.

The *Norwalk Teachers* case is perhaps the best example which points the way to approval, within reasonable limits, of permitting a union, representing public employees, and a governmental unit to bargain collectively for certain meaningful goals. In *Norwalk* the fundamental limitation placed on the teacher association therein involved, was that it could only bargain for the teachers it actually represented. This is different than the attitude in the business-industrial field, where the rule is that the union selected as the representative of the majority in an appropriate unit bargains, for all employees that fall within the unit, including those who are not members of the union.

The authorities[9] seem to agree that in the absence of a specific statute, authorizing a union representing a majority of public employees in an appropriate unit to represent all in the unit, the union may only negotiate for its members. In other words, the School Board may recognize a union of public employees, but as the representative of its members only. This is made clear by the language in *Norwalk:*

> It would seem to make no difference theoretically whether the negotiations are with a committee of the whole association or with individuals or small related groups, so long as any agreement made with the committee is confined to members of the Association.[10]

Other reasonable limitations placed upon collective bargaining can best be viewed from the positive approach of noting what kind of collectively bargained contract terms have been approved, and the reasons stated for the approval. In the reasoning, distinctions are made which spell out limitations. The logic of the decisions in this area strike most directly at the philosophy shared by some, that bargaining and agreement constitute a usurpation of the legislative function and, therefore, cannot be sanctioned.

In *Norwalk,* dealing specifically with collective bargaining with a teachers' association,[11] the Court makes clear that there can be negotiations over salaries. The judges qualify by pronouncing that the parties are restrained as to the outer limits by any statutes which might place

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[9] Ryne, Labor Unions and Municipal Employee Law, pp. 134-35 (1946), and Union Activity in Public Employment, 55 Colum. L. Rev. 343 (1955).

[10] *Supra,* note 6, at 486.

[11] Some efforts have been made to forbid bargaining with a union affiliated with a national or international labor organization and permit it with an unaffiliated teacher organization. The justification for such a distinction is said to lie in the belief that a national and international union is more apt to induce work stoppage. For reasons noted hereafter this does not seem to be too sound a theory.

ultimate budget control in some other official governmental body. Obviously, an effective check would be created by any legislation putting a brake on total revenue which could be collected for school purposes.

The *Norwalk* decision further approved negotiating on such matters of concern to teachers as employment, working conditions and grievance procedures. But again the admonition is clear that a School Board may not sign a contract which contains a provision contrary to law. As a matter of fact, this is not a principle unique to labor relations law as it applies to governmental employees. Even in the commercial field, collective bargaining does not carry with it the implication that existing statutes may be nullified or abridged.

The Arizona Supreme Court makes this philosophy quite clear in its statement:

> If a civil service scheme provides for the regulation of matters normally contained in a collective bargaining agreement the conflicting terms of both could not exist concurrently. The inconsistency would be resolved in favor of the statute.[12]

A matter which would surely be of interest to any union bargaining for its constituents, would be provisions concerning tenure. If statutory law were silent on tenure, a School Board might very well permit bargaining for contractual tenure. If a tenure law existed it would probably foreclose negotiations. The usual tenure legislation contains provisions for a probationary period, prohibition against discharge after permanent tatus attaches, except for stated cause and a procedure for dismissing a teacher—including notice of charges, investigation, trial and decision by the School Board. The usual specific tenure legislation is such that it would appear certain to leave little room for collective bargaining.

Frequently laws on retirement and pension legislation are rather detailed. Most often the field has undoubtedly been preempted as against collective bargaining.

Since legislation is not too common in all areas of working conditions, a Board of Education might very well agree to bargain over certain matters which it might eventually permit to be incorporated into a contract. For example, the parties could agree on responsibilities for supervision at extra curricular events, such as student dances and athletic events. A great many other matters bearing upon working conditions could become the subject of discussion and solutions might eventually appear in contract form.

In the commercial field of labor relations, negotiating parties have often manifested an awareness of the fact that provisions for the arbi-

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[12] Local 266, International Brotherhood of Electrical Workers, AFL v. Salt River Project Agricultural Improvement and Power District, 78 Ariz. 30, 275 P. 2d 393, 397 (1954).

tration of controversies arising under contracts, are the most peaceful and efficient way of settling disputes which have arisen under contracts. Certainly such provisions provide a less cumbersome way of settlement than a lawsuit. The standard contract providing for arbitration, contains clauses spelling out the grievance procedure which is to be followed prior to going to arbitration. The courts have given considerable attention to the question of whether public employees can include an arbitration clause in any contract which results from collective bargaining.

The tone of court thinking is strictly along the lines of reasoning that has been previously outlined. Some courts think the provision would be a complete abdication of authority delegated to the School Board by legislative act. The Ohio court expressed this attitude when it said:

> Under the civil service laws of the state and city, it would seem a vain and futile thing for the Transit Board to refer the issues to an arbitrator who with the best intentions, but in ignorance of civil service law, might make an award which it would be legally impossible for the Transit Board to accept.[13]

The *Norwalk* case takes a more moderate view. As was true in connection with the issue of bargaining for certain contract advantages, the court recognized that there is no reason to deny altogether the power of a School Board to enter voluntarily into a contract to arbitrate a specific matter. On the other hand, the Court shows an awareness that an agreement to submit all disputes to arbitration would be in a different category and improper. This, indicated the Court, might put the School Board in a position where it likely would find itself committed to surrender the discretion and responsibility imposed on it by law. As an illustration, the Court stated the School Board could not commit to arbitration the question of whether a t e a c h e r was discharged "for cause." Since legislation gives the School Boards authority to make investigations, hold hearings and make a determination as to whether there is "cause" for dismissal, the Court concluded a School Board could not delegate its duties to an arbitrator or board of arbitrators.

The ultimate answer is, therefore, likely to depend upon the degree of specificity by which the legislature has imposed a responsibility upon the School Board. As was true in connection with the part of this discussion which had to do with bargaining on salaries, there will be certain limits which an arbitrator may receive a delegation to function. The keeping of an arbitrator confined within limits, insures that the School Board will not have to surrender the essence of its power.

No discussion concerning the ability of public school teachers and

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[13] City of Cleveland, *supra,* note 4.

employees to engage in concerted activities common for labor organizations can be complete without facing up to the right to strike and picket in support of strikes. The judicial attitude in this regard is uniform. All courts and authorities[14] agree that the right does not exist. The philosophy which supports this conclusion has been variously expressed. The Attorney General of the State of Minnesota told the Board of Regents of the University of Minnesota that "should we accept the doctrine permitting strikes we would in effect transfer to such employees all legislative, executive and judicial powers now vested in the duly elected or appointed public officers." Calvin Coolidge, in dealing with the question of strikes by public employees, took the position that there is "no right to strike against public safety by anybody anywhere at any time." Woodrow Wilson called strikes by public employees "an intolerable crime against civilization."[15] The *Norwalk* case quotes Franklin D. Roosevelt, whom it identifies as certainly no enemy of labor, as saying, "a strike of public employees manifests nothing less than an intent on their part to prevent or obstruct the operation of government and such action is unthinkable and intolerable."

It appears particularly logical to conclude that a state can halt the strike and picketing in support of strike activities. Continued operation of schools is certainly vital to general welfare. State police power can surely insure that such operation is not interrupted by picketing and strikes. Furthermore, school personnel, most particularly teachers, work in a sensitive area. Picket lines would be especially disruptive of pupil morale. Teachers on strike might likely lose the respect of enough pupils so as to destroy their usefulness as instructors. The reason also suggests that no real distinction can be made between teacher picketing in aid of a strike and that in support of recognition or organizational efforts.

Some may feel that there is not the same danger in connection with organizational and recognition picketing by school personnel other than teachers. A valid distinction based on such facts seems doubtful. If picketing produces any repercussions which would hinder normal functioning of a school, it obviously could be halted. Furthermore, it seems totally inappropriate to allow pickets to parade around a school. The immature, impressionable minds of youth, who have no real concept of what a picket line may validly stand for, may be subtly influenced to have less respect for school authority. The danger that this could happen is one that School Boards do not have to risk.

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[14] For a summary of authorities see Seasongood and Barrow, Unionization of Public Employees, 21 U. of Cinc. L. Rev. 327 (1952). Also see Ryne, *supra*, note 9 at 44. The *Norwalk* case is in accord.

[15] These attitudes are quoted by Vogel in What About the Right of the Public Employee, 1 Lab. L. J. 604 (1950).

The mere conclusion that picketing and striking on the part of school personnel is not sanctioned, does not fully explain the right of the School Board in combating such tactics. The injunction can be used to halt the activity. School personnel can be discharged and disciplined. Contract rights may be pursued. There is, however, no way by which individuals can be forced to return to work.

Since it is so generally agreed that public employees, particularly teachers, do not have the right to picket and strike, the argument is made that all privilege to join unions, bargain collectively and enter into negotiated agreements should be denied. This is on the premise that permitting the joining of unions, bargaining collectively and entering into negotiated agreements is entrenching an organization which by tradition is impelled to use the economic weapon of the picket line and strike. This argument does not persuade. As long as courts stand firm against use of picketing and strikes by public employees, unions and associations of public employees are not likely to use the pressure of such weapons. Furthermore, unions and organizations of public employees should realize that if such pressures are applied the governmental employer is not apt, under existing circumstances, to voluntarily agree to bargain and adhere to contract terms. In this connection it is appropriate to recall again that unless a statute provides to the contrary (and few do) the School Board is not required to recognize a union or association of school personnel. Even if statutes should be passed encouraging recognition and bargaining they will undoubtedly provide severe penalties if strikes or picketing pressure is used.

By way of moving to conclusion, it is appropriate to think about the policy question as to whether School Boards should voluntarily agree to recognize and bargain collectively with associations or unions of school personnel. The philosophy of good employee and public relations would appear to dictate an affirmative answer. Good faith bargaining is one of the best ways of keeping the school personnel public realistically informed about vital problems of school administration. The teacher segment of the school personnel group ought to be especially responsive to this kind of approach. Another benefit of good faith collective bargaining can be the creating of a climate which will enlighten the general public as to problems of the school and enlist assistance for their solution.

One further point needs to be made clear. The very meaning of collective bargaining affords protection to School Boards. Collective bargaining does not require that there must ultimately be capitulation. Even in the industrial arena parties are required only to bargain in good faith.

The facts involved in each bargaining situation dictate the elements of good faith. The present does not permit exhaustive analysis. One

of the frequent requirements is an exchange of factual information to support certain positions which a party may assume. Often a party must reasonably explain why a certain concession will not be granted. An employer does not bargain in good faith if he takes an arbitrary position that he need make no response or do anything unless he receives a suggestion which seems reasonable. Some counter proposals must be submitted.

The application to School Boards of the "good faith" collective bargaining mandate is, of course, legally affected by the fact that in the vast majority of comunities (unless legislation intervenes) the law does not compel School Boards to bargain collectively. Hence if a School Board voluntarily agrees to bargain, the law would not impose a legal duty to follow the rules of good faith negotiations. But if School Boards are motivated to bargain collectively by a desire to maintain good relations with employees and the public, it would defeat the purpose if the Boards did not bargain in good faith.

In conclusion it seems realistic to predict that the future position of School Boards in labor relations, may be regulated by statutory enactments to a greater extent than at present. Legislation may decree collective bargaining. Reasons spelled out in this article suggest that there are no complete barriers to such development. Previous discussion has indicated that any legislative evolution will have to be within the framework of other relevant statutes. The task of determining if any existing legislation places limitations on subjects which can be topics for collective bargaining and contractual agreement will continue to exist.